

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Issue date: 14Mar2002

CASE NUMBER: 2000-LHC-3217

OWCP NO.: 6-168989

IN THE MATTER OF

SHARYL BUSKEY, widow of
CHARLES BUSKEY, deceased,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

Scott O. Nelson, Esq.
On behalf of Claimant

Donald Moore, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Sharyl Buskey (Claimant), widow of Charles Buskey (Decedent), on behalf of herself and her minor child, Jhory Buskey, against Ingalls Shipbuilding, Inc. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 15, 2002, in Mobile, Alabama.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced forty-nine exhibits, including various Department of Labor filings, a death certificate of Decedent, social security records, various releases executed by Claimant and Decedent, various court records, medical records from Springhill Memorial Hospital, medical records from Dr. Michael Meshad, medical reports from Drs. Larry Mitchell and Richard Kradin, discovery responses, the deposition of Sharyl Buskey, a ship-list of vessels Decedent worked on, and funeral expenses.¹

Employer objected to the introduction of CX 40 & 48 (a medical opinion letter from Dr. Kradin and an article explaining that a diagnosis of asbestosis was not necessary to have asbestos related lung cancer) on the basis that they are general statements by physicians who did not examine Decedent. Those exhibits, however, were admitted for the purpose of clarifying that there is a difference of opinion in the medical community over the issue. Employer introduced thirteen exhibits which were admitted including Department of Labor filings, medical records from Providence Hospital, medical reports from Drs. Phillip Cagle and Robert Jones, discovery responses, and court records.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Decedent was an employee of Employer;
2. Employer was timely advised of the injury/death;
3. Notice of Controversion was timely filed;
4. Decedent's date of death was June 26, 1995;
5. The national average weekly wage at the time of Decedent's death was \$380.46;
6. Claimant was married to Decedent at the time of his death;

¹ References to the transcript and exhibits are as follows: Trial Transcript- Tr.____; Claimant's Exhibits- CX-____, p.____; Employer Exhibits- EX-____, p.____; Administrative Law Judge Exhibits- ALJX-____, p.____.

7. Jhory Buskey is the natural child of Decedent and the date of his birth is September 14, 1990;
8. Employer was Decedent's last maritime Employer; and
9. When Decedent worked at Employer's facility, asbestos products were present.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation;
2. Section 33 and whether Claimant is barred from receiving death benefits due to unapproved third party settlements, and if Claimant is not bared, is the Employer entitled to credit for pre-death settlements; and
3. Attorney's fees and interest.

III. STATEMENT OF THE CASE

A. Chronology:

On September 9, 1972, Decedent married Claimant. (CX 11). Decedent's brother Sam Buskey III, helped Decedent obtain a job with Employer as a heater straightener. (Tr. 65-67). Employer's records reflect that Decedent was hired on September 14, 1972 and that his last day of work was on November 15, 1974. (CX 35, p. 3). Claimant bore two children by Decedent, Nikita, born March 24, 1973, and Jhory, born September 14, 1990. (CX 12; CX 46, p. 6).

Decedent's work history included: a job as a custodian for Lerner Shops of Alabama in 1971; a laborer for Moss Thornton Construction in 1972; a heater-straightener for Employer from 1972-1974, a few months of employment at halter Marine in 1986; and lastly, Decedent worked for Scott Paper company as a machinist from 1974 to 1991. (CX 46, p. 7). After 1991, Decedent stopped working because of his cancer. (CX 44, p. 7).

Decedent's job as a heater straightener entailed smoothing over warps in the steel components of a vessel, and his job assignments were not restricted to any particular area in the shipyard or vessel, but he was required to move about different areas and compartments of the vessel. (Tr. 66). Although the job only required the use of a torch and a water sprayer, Decedent was often performing work around employees such as pipe-fitters, ship-fitters, welders, insulators, journeymen, electricians, and whoever else

happened to be in the shipyard. (Tr. 66). Many of these workers used asbestos products, and because Decedent worked in close proximity to them, he was exposed to asbestos dust on a daily basis. (Tr. 69-77). Decedent did not wear a respirator and there were no regulations requiring their use. (Tr. 76). For twenty years Decedent smoked a pack of cigarettes a day, but he quit in 1989, six years before his death. (Tr. 45).

On August 24, 1991, Decedent took part in a asbestos injury screening with Dr. Mitchell, a specialist in internal medicine. (CX 39). Dr. Mitchell noted dyspnea associated with a cough productive of mucoid phlegm. *Id.* at 1. Dr. Mitchell related Decedent's limitation as "class two" which was characteristic of dyspnea when walking fast or climbing a hill. *Id.* Dr. Mitchell also noted a two year history of working for Employer around asbestos related products, but did not report Decedent's smoking history. *Id.* A pulmonary function evaluation revealed a FVC capacity of 77% of predicted, with otherwise normal ratios. *Id.* at 2. Also, a x-ray film revealed mild to moderate bilateral thoracic wall pleural thickening. *Id.* at 3. There was evidence of mild to moderate interstitial pulmonary fibrosis involving the inferior half of each lung. *Id.* Decedent had aortic arch calcification and bilateral bronchial wall thickening with small irregular opacities scattered throughout all lung zones. *Id.* All of these findings prompted the radiologist and Dr. Mitchell to diagnose pulmonary asbestosis. *Id.*

On October 15, 1991, Decedent and Claimant executed affidavits regarding his asbestos exposure and sent them to various producers and manufacturers of asbestos including such companies such as: GAF Corp., Combustion Engineering, Inc., Babcock and Wilcox Co., Owens-Corning Fiberglass Corp., Foster Wheeler Corp., and IMO Industries, Inc. (CX 14-19). Decedent also submitted a proof of claim form on October 22, 1991, with the UNR Asbestos-Disease Claims Trust. (CX 22). On April 15, 1992, Decedent filed an asbestos-related complaint in the Circuit Court of Jackson County, Mississippi, against Owens-Corning Fiberglass Corp. and other defendants in the asbestos industry. (CX 13). On April 25, 1997, Decedent's attorney, without the knowledge of Claimant, executed a proof of claim on behalf of Decedent to partake in the Amatex bankruptcy estate. (CX 23).

After filing claims for an asbestos related injury, Decedent and Claimant periodically released specific defendants pursuant to settlement agreements. For example, on August 17, 1993, Selby Battersby & Co., Riley-Stuart Supply Co., Inc., and J.E. Steigerwald, were released from Decedent's asbestos litigation for \$750.00. (CX 21, p.1-2). On February 25, 1994, they released all of their personal injury, wrongful death and related insurance claims against defendants who were grouped into categories dubbed the "Fiberboard Releases," "Continental Releases," and the "Pacific Releases." (CX 46, p. 137-144). On November 6, 1994, Anchor Packing Company, was released for \$1,000.00. (CX 20, p. 1-4). On June 8, 1995, while Decedent was still alive, his attorney's signed a Stipulation to Dismiss Minnesota Mining and Manufacturing Co. for an unspecified settlement amount.² (CX 28, p. 1-2).

² More releases were signed, however, all such activities took place before the Decedent's death. (EX 11).

Meanwhile, in May of 1994, Decedent felt as if he had indigestion and sought medical attention. (Tr. 45). X-rays taken on May 26, 1994, indicated that Decedent had a prominence of the right hilum measuring 1.5 to 2 centimeters in diameter indicating a “possible right hilar mass verses a prominent right main pulmonary artery.” (CX 37, p. 3). Other films taken on the same day revealed a small calcific density in the right pelvis most likely representing a phlebolitis. *Id.* at 7. On June 6, 1994, Claimant had a cytology report indicating that Decedent had malignant cells that strongly favored oat cell carcinoma. (CX 37, p. 1). On June 9, 1994, Decedent underwent a guided liver biopsy and a CT scan of his abdomen revealing a mass in the right lobe of the liver, measuring 70 x 94 mm, that was most likely a metastatic lesion. *Id.* at 5. A CT of the chest performed on June 14, 1994, revealed redemonstration of the large right hepatic lobe liver mass and small right hilar lymph nodes. *Id.* at 8. Decedent also had a mildly depressed ejection fraction on a MUGA scan of forty-four percent. *Id.* at 11.

Decedent’s treating physician, Dr. Meshad, diagnosed small cell carcinoma of the right lung with liver mets on June 28, 1994, and related that without chemotherapy Decedent’s life span could be measured in months. (CX 38, p. 7). After three sessions of chemotherapy, Dr. Meshad remarked that Decedent tolerated the treatment “beautifully.” *Id.* By October 4, 1994, however, the progression of Decedent’s small cell lung cancer, as was evidenced by increasing liver mets and increasing mediastinal disease, caused him increasing pain and Dr. Meshad changed the course of treatment from CEV chemotherapy to a trial of Taxol and Platinol combination chemotherapy. *Id.* at 8. On October 18, 1994, Dr. Meshad opined that Decedent’s asbestos exposure contributed to the development of his lung cancer as a co-carcinogen operating in concert with tobacco exposure. (CX 36).

On April 10, 1995, Decedent was admitted to Providence Hospital complaining of intractable nausea and vomiting, and also to undergo radiation therapy and a MR scan of the brain. (EX 5, p. 4). The MR scan revealed numerous lesions consistent with metastatic disease. *Id.* at 8. When Decedent was discharged on April 12, 1995, Dr. Meshad diagnosed central nervous system metastasis, nausea and vomiting secondary thereto, and small cell lung cancer with metastasis to lung, bone, brain and liver. *Id.* at 7. Both Claimant’s condition on discharge and prognosis were “poor”. *Id.* On June 26, 1995, Claimant died from lung cancer³ at age forty-three. (CX 7). Decedent’s funeral expenses were \$3,750.00. (Tr. 46; CX 49). Subsequently, Claimant initiated a proceeding under the Longshore Act on Decedent’s behalf and executed a writing on December 19, 1995, instructing Maples & Lomax that she did not want to enter into any unapproved third party settlements in relation to Decedent’s tort litigation. (CX 26).

Numerous settlement checks were received in to Maples & Lomax’s trust account on different dates ranging from July 11, 1995, to October 6, 1998, and totaled \$8,298.78. (CX 11, p. 11). None of the settlements checks were distributed to the estate of Decedent and are still held in the trust account. (Tr. 57). Additionally, on April 25, 1997, Maples & Lomax submitted a proof of claim form in the bankruptcy

³ Claimant related that Decedent died of metastasized lung cancer, but was in excellent health up until a year-and-a-half before his death. (Tr. 44).

of Amatex without the knowledge or permission of Claimant. (Tr. 59-60; CX 23). On September 23, 1998, Amatex sent Maples & Lomax a check for \$107,280.00 due from the settlement trust for all of the attorney's clients entitled to payments. (CX 34). On December 13, 1999, Maples & Lomax sent Amatex a check for \$480.00, representing Decedent's share of the settlement, relating that such settlements were not being accepted out of fear of jeopardizing the Longshore claims. (CX 24-25). On November 15, 2000, Amatex, pursuant to a bankruptcy order, sent another distribution check to Maples & Lomax to hold in trust. (CX 31-32).

B. Claimant's Testimony

Claimant, the surviving widow of Decedent, testified that she married Decedent in 1972 and has two children fathered by him, Nikita Chanel, twenty-nine years of age, and Jhory Buskey, eleven years of age. (Tr. 42-43). Since the time of his death, Claimant has not remarried or become engaged. (Tr. 44). Claimant Jhory Buskey was not present at hearing because he was attending school. (Tr. 46). Jhory was in the fifth grade, an honor roll student, and both Jhory and his mother anticipated that he would attend college. (Tr. 47).

Claimant was familiar with Decedent's work history in that she knew he was a heater straightener for Employer and that he came home from work dusty. (Tr. 47). Prior to his death, Decedent received settlements in different amounts from the responsible parties for which he and Claimant would sign documents. (Tr. 48-49). After Decedent's death on June 26, 1995, however, Claimant did not receive any settlement money, did not sign any releases, and did not authorize anyone to accept money on her behalf. (Tr. 49). Claimant has not opened an estate following Decedent's death, and on December 19, 1995, Claimant executed documents stating that she did not want any asbestos settlements. (Tr. 53-54). Jhory Buskey never signed any documents regarding any settlements either before or after Decedent's death. (Tr. 54).

On cross-examination, Claimant testified that she was unaware that the law firm of Maples & Lomax, also representing her on the longshore claim, held settlement funds in the firm's trust account, dating back to 1995 in relation to Decedent's pre-death releases. (Tr. 56). Indeed, \$8,298.78 was deposited in the account from July 1995 to October 1998, of which Claimant had no knowledge until March 14, 2001. (Tr. 61; CX 11, p. 11).

C. Testimony of Sam Buskey III

Sam Buskey, brother of Decedent, also worked for Employer as a heater straightener during the time that Decedent alleged he was exposed to asbestos, and he trained Decedent on how to perform the job. (Tr. 65-67). For the entire time Decedent worked for Employer, Sam Buskey and Decedent worked on the same crew on the same shift. (Tr. 68).

Sam Buskey testified that he had first hand knowledge that Decedent was exposed to asbestos,

and he related that Decedent worked around insulators, who mixed asbestos in a vat to form casings around pipes.⁴ (Tr. 69). Insulators also used fiberglass to form pipe casing and Sam Buskey was unaware which product was in use from one day to another. (Tr. 88). Sam Buskey stated that when the asbestos power was mixed with water, the process forced particles into the air, where it had the appearance of snow. (Tr. 71). About two-thirds of the time, heater straighteners worked inside the vessel. (Tr. 81). A particularly hazardous area of the vessel was the engine room when the insulators worked. (Tr. 71). Air was pumped into this area which helped to stir up asbestos dust particles. (Tr. 77). Although Decedent was exposed to asbestos powder on a daily basis, he did not, nor was he required to, wear any type of respirator or breathing mask. (Tr. 72, 76). Before going home, Decedent used an air hose to blow the dust off his clothing. (Tr. 81). Decedent, however, also had a moustache in which dust particles would settle. (Tr. 81).

Sam Buskey testified that he too was diagnosed with asbestos and had filed lawsuits against asbestos companies. (Tr. 72). He was also terminated from working for Employer on more than one occasion. (Tr. 83-84). Furthermore, he related that he had worked for Employer about five years longer than Decedent, was a smoker, and did not have any type of cancer. (Tr. 85).

D. Exhibits

D(1) Medical Report of Dr. Larry Mitchell

On August 24, 1991, Dr. Mitchell, a specialist in internal medicine, examined Decedent concerning dyspnea associated with a cough productive of mucoid phlegm at an asbestos-related product health screening. (CX 39, p.1). Dr. Mitchell related Decedent's limitation as "class two" which was characteristic of dyspnea for those who had difficulty walking fast or climbing a hill. *Id.* Dr. Mitchell noted a two year history of working for Employer and around asbestos related products, and specifically related that Decedent did not smoke cigarettes. *Id.* A pulmonary function evaluation revealed a FVC capacity of 77% of predicted, with otherwise normal ratios. *Id.* at 2.

An x-ray film revealed mild to moderate bilateral thoracic wall pleural thickening. *Id.* at 3. There was also evidence of mild to moderate interstitial pulmonary fibrosis involving the inferior half of each lung. *Id.* Additionally, Decedent had aortic arch calcification and bilateral bronchial wall thickening with small irregular opacities scattered throughout all lung zones. *Id.* All of these findings prompted the radiologist and Dr. Mitchell to diagnose pulmonary asbestosis. *Id.*

⁴ Despite his assertions that he had first hand knowledge that asbestos products were used, Sam Buskey could not confirm with certainty that asbestos was used. Sam testified that "after finding out about asbestos, that was the only thing I could figure it could be." (Tr. 88). Sam Buskey never learned about asbestos until the "lawsuits came out." (Tr. 89).

D(2) Medical Records from Springhill Memorial Hospital

X-rays taken on May 26, 1994, indicated that Decedent had a prominence of the right hilum measuring 1.5 to 2 centimeters in diameter leading the reviewing physician to state that Decedent had a “possible right hilar mass verses a prominent right main pulmonary artery.” (CX 37, p. 3). Other films taken on the same day revealed a small calcific density in the right pelvis most likely representing a phlebolitis. *Id.* at 7. On June 6, 1994, a cytology report indicated that Decedent had malignant cells strongly favoring oat cell carcinoma. (CX 37, p. 1). On June 9, 1994, a guided liver biopsy was performed, as well as a CT scan of Decedent’s abdomen, revealing a mass in the right lobe of the liver, measuring 70 x 94 mm, that was most likely a metastatic lesion in the liver. *Id.* at 5. A second CT of the chest performed on June 14, 1994, revealed redemonstration of the large right hepatic lobe liver mass and small right hilar lymph nodes unchanged since the earlier scan. *Id.* at 8. Decedent also had a mildly depressed ejection fraction on a MUGA scan of forty-four percent. *Id.* at 11.

D(3) Medical Records of Dr. Meshad

On June 10, 1994, Dr. Meshad, an oncologist, issued a consultation report finding small cell carcinoma of the tight hilar area with liver metastasis. (CX 38, p. 1). Decedent was referred to Dr. Meshad after a CT scan revealed what was thought to be a metastatic lesion, a needle biopsy revealed oat cell or small cell carcinoma, and x-rays showed a possible right hilar mass. *Id.* Dr. Meshad did not discover any significant past medical or family history. *Id.* at 5. Decedent did smoke about a pack of cigarettes a day for nearly twenty years, but had stopped smoking completely six years ago. *Id.*; (CX 36).

On June 28, 1994, Dr. Meshad reaffirmed small cell carcinoma of the right lung with liver mets and related that without chemotherapy Decedent’s life span could be measured in months. *Id.* at 7. By July 6, 1994, Decedent opted to undergo chemotherapy. *Id.* After three sessions, Dr. Meshad remarked that Decedent tolerated the treatment “beautifully.” *Id.* By October 4, 1994, however, the progression of Decedent’s small cell lung cancer, as was evidenced by increasing liver mets and increasing mediastinal disease, caused him increasing pain and Dr. Meshad changed the course of treatment from CEV chemotherapy to a trial of Taxol and Platinol combination chemotherapy. *Id.* at 8. Dr. Meshad further opined that Decedent’s asbestos exposure contributed to the development of his lung cancer as a co-carcinogen operating in concert with tobacco exposure. (CX 36).

D(4) Medical Records from Providence Hospital

On April 10, 1995, Decedent went to Providence Hospital complaining of intractable nausea and vomiting, and also to undergo radiation therapy and a MR scan of the brain. (EX 5, p. 4). The MR scan revealed numerous lesions consistent with metastatic disease. *Id.* at 8. When Decedent was discharged on April 12, 1995, Dr. Meshad diagnosed central nervous system metastasis, nausea and vomiting secondary thereto, and small cell lung cancer with metastasis to lung, bone, brain and liver. *Id.* at 7. Both Claimant’s condition on discharge and prognosis were “poor.” *Id.*

D(5) Medical Report of Dr. Richard Kradin

Claimant's attorney asked Dr. Kradin, an associate professor of pathology at Harvard Medical School and Director of Pulmonary Immunology and Molecular Biology at Massachusetts General Hospital, whether lung cancer can be considered an asbestos-related neoplasm in the absence of asbestosis. (CX 40, p.1). On July 13, 2001, not specifically in relation to Claimant's case, Dr. Kradin noted that the matter was controversial with medical experts holding different opinions. *Id.* Specifically, the controversy concerned whether asbestos exposure could lead to lung cancer without a diagnosis of pulmonary asbestosis. *Id.*

Dr. Kradin first noted that each individual reacts to asbestos exposure differently, and even those who develop asbestosis will not necessarily develop lung cancer. *Id.* If asbestosis was required before asbestos-related lung cancer then there would "be either 1) a formally determined biological mechanism that links asbestosis to the development of lung cancer or 2) incontrovertible epidemiological data to support such a conclusion." *Id.* Neither factor has been established by medical science. *Id.* Dr. Kradin's impression was that lung cancer could arise in patients who have been occupationally exposed to asbestos, in the absence of asbestosis. *Id.* at 2.

D(6) Medical Report of Dr. Phillip Cagle

Dr. Cagle, Director of the Department of Pathology at Baylor College of Medicine, issued a report on October 23, 2002, after reviewing three glass slides, a death certificate and medical records from Drs. Meshad and Mitchell as well as radiology reports and records from Providence Hospital and Springhill Memorial Hospital. (EX 6, p. 1). Dr. Cagle commented that lung cancer was the number one cause of cancer deaths in the world and the majority of such deaths are caused by tobacco, which contains some 4,000 to 5,000 chemicals including many carcinogens. *Id.* at 2. Tobacco induced lung cancer typically causes specific mutations that act as a "fingerprint" to identify tobacco as the cause of lung cancer. *Id.* Decedent was forty-two years old when first diagnosed with small cell carcinoma, and Dr. Cagle correlated that with the fact that there is an increased incidence of small cell carcinoma in lung cancer patients under the age of fifty that is associated with tobacco. *Id.* Indeed, nearly ninety percent of all lung cancers and virtually one-hundred percent of all small cell carcinomas of the lung are caused by tobacco smoking. *Id.* Dr. Cagle opined that Decedent's tobacco use was sufficient to cause small cell carcinoma even six years after he quit smoking. *Id.*

Dr. Cagle further noted that Decedent's 1991 x-ray was interpreted as showing interstitial fibrosis, but none of the x-ray or CT scans taken thereafter mention such a finding. *Id.* Tobacco use could also cause interstitial lung disease. *Id.* at 3. A definitive determination of whether a worker has asbestosis can be made from examining a sample of lung tissue. *Id.* at 4. In Decedent's case, however, no such evidence was available. *Id.* Dr. Cagle also related that he was missing the relevant asbestos exposure data and he could not determine whether Decedent was exposed to more than twenty-five fibers per cc year during his employment, which is the minimum amount necessary to develop asbestos related lung cancer. *Id.* at 3-4.

High levels of asbestos exposure can contribute to the development of lung cancer without a diagnosis of asbestosis. *Id.* at 3. Dr. Cagle stated, however, that “for all practical purposes, patients with lung cancer and the minimal amount of asbestos exposure necessary to increase the risk of lung cancer on digestion study always have asbestosis. *Id.* Dr. Cagle estimated that high levels of asbestos exposure, by itself, contributes to two percent of all lung cancer. *Id.* Of course, patients who use tobacco and are exposed to asbestos have an increased risk of developing lung cancer. *Id.*

Dr. Cagle concluded that, within a reasonable medical probability, Decedent’s small cell carcinoma was caused by tobacco smoking. *Id.* at 4. Additionally, lacking the requisite exposure data, Dr. Cagle had no basis for attributing Decedent’s lung cancer to asbestos exposure. *Id.* at 4-5.

D(7) Medical Records of Dr. Robert Jones

On December 23, 2001, Dr. Jones, a professor of medicine at Tulane University Medical Center, reviewed Decedent’s medical records. (EX 8, p. 1). Dr. Jones stated that “[a]ttribution of lung cancer to asbestos exposure (with reasonable medical certainty) requires a diagnosis of asbestosis.” *Id.* at 2. Because no lung tissue was available for examination, a diagnosis of asbestosis must depend on evidence of lung scarring from chest x-rays and CT scans. *Id.* at 3. Dr. Jones concluded that none of the chest x-rays, including the ones taken in 1991, showed lung scarring or pleural plaque. *Id.* Additionally, Dr. Jones noted that two or three years of exposure would not be expected to cause asbestosis. *Id.* Accordingly, Dr. Jones found no sound basis for attributing Decedent’s lung cancer to asbestos exposure. *Id.* Instead, Dr. Jones opined that Decedent’s lung cancer was due to his smoking history. *Id.*

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that Decedent’s death was caused, in part, by a significant exposure to asbestos, and that this exposure acted as a co-carcinogen in concert with Decedent’s smoking history to cause Decedent’s lung cancer. Claimant further contends that releases executed by Decedent and Claimant are not a bar Claimant’s recovery of Section 9 death benefits because Claimant was not a “person entitled to compensation” at the time those releases were executed and Claimant was unaware that monies had been deposited in to Decedent’s trust account at the law firm of Maples & Lomax after the date of Decedent’s death. Under Section 33, the law firm of Maples & Lomax is not the “legal representative” of Decedent because it is not a “person entitled to compensation, ” and Claimant never authorized Maples & Lomax to accept any third-party offers without Employer’s approval. Additionally, Claimant contends that a bankruptcy distribution check, for which a proof of claim was filed post-mortem, did not constitute a settlement under Section 33(g), but was more similar to an adjudication. Claimant also asserts that she never accepted the distribution check on behalf of Decedent, and that the firm of Maples & Lomax was not the “legal representative” of the Decedent as defined under Section 33. Regardless, the distribution check was sent back to the bankruptcy claims trust. Under Section 33(f) Claimant contends that Employer

is not entitled to a set-off for settlement monies received as a result of Decedent's third party litigation.

Employer contends that the Decedent worked at Employer's facility for just over two years and that Decedent could not have had enough exposure during that period to develop asbestos related lung cancer. Also, later CT scans revealed no pleural thickening, pleural placquing, or fibrosis, which are all evidence of asbestos exposure, and in the absence of asbestosis a diagnosis of asbestos-related lung cancer cannot be reached. Employer also contends that Claimant's receipt of third party settlements, after Decedent's death, pursuant to releases Claimant signed with Decedent, acts as a bar to recovery under Section 33(g) because when those funds were deposited in the Decedent's trust account at the law firm of Maples & Lomax, Claimant was a "person entitled to compensation." Acceptance by the law firm of Maples & Lomax constituted acceptance by Claimant. Alternatively, Employer alleges that it is entitled to a credit under section 33(f) for any money received by Claimant from third parties as a result of Decedent's tort litigation.

B. Causation

To prove entitlement to Section 9 death benefits, Claimant must show that Decedent suffered harm caused by his employment. *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336, 338 (1981). Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Addison v. Ryan Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 101 (1986). To rebut the Section 20(a) presumption, the Employer must present substantial evidence that a claimant's condition is not caused by a work-related accident or that the work-related accident did not aggravate Claimant's underlying condition. *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998). Under the Administrative Procedures Act, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281, 114 S. Ct. 2251, 129 L. Ed 2d. 221 (1994).

Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966); *Kubin*, 29 BRBS at 119. The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990). All factual doubts must be resolved in favor of the claimant. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

B(1) Prima Facie Case

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between the work and the harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. Here, Decedent died with lung cancer and exposure to asbestos is a cause of lung cancer. (CX 38, p. 7; CX 40). Sam Buskey, who worked with Decedent every day from 1972 to 1974, testified that dust from asbestos related products was so visible in the air that the particles resembled snow. (Tr. 71). Decedent executed six affidavits prior to death relating that he was exposed to asbestos. (CX 14-19). Employer also stipulated that asbestos products were present at its facility when it employed Decedent. (ALJX 1). Accordingly, I find that Claimant established that conditions existed at Employer's facility that could have caused an asbestos related injury entitling Claimant to a presumption that Decedent's work conditions either caused or contributed to his physical impairment.

B(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999) citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). See also, *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *O'Kelly v. Dep't of the Army/NAF*, 34 BRBS 39, 41-42 (2000) (holding that the presumptions overcome when a physician "unequivocally states, to a reasonably degree of medical certainty, that the harm is not related to the employment."); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94, 95 (1988) (finding that the presumption overcome when there is medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure).

Employer introduced the medical reports of Drs. Jones and Cagle who related that Decedent's lung cancer was not related to an asbestos related injury, but to a reasonable medical probability, his lung cancer was due to smoking a pack of cigarettes a day for twenty years. (EX 6, p. 4; EX 8, p. 3). Accordingly, Employer has produced substantial evidence to rebut the presumption of causation and the issue of causation must be based on the record as a whole.

B(3) Causation on the Basis of the Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20(a) presumption, the claimant must establish causation based on the record as a whole. *Noble Drilling Co.*, 795 F.2d at 481. If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

B(3)(a) Evidence Establishing that Claimant Suffered from an Asbestos-Related Lung Impairment

Decedent worked at Employer's facility from September 14, 1972, to November 14, 1974. (CX 35, p. 3). During the course of his employment as a heater-straightener, Decedent was required to work around other employees who frequently used asbestos-related products. (Tr. 69-77). Often Decedent would work in confined spaces, in the presence of asbestos dust particles, without respiratory equipment. (Tr. 76-81). At the end of every day Decedent used an air hose to blow the dust off his clothing. (Tr. 81). Nonetheless, dust clung to Decedent's clothing and settled in his moustache despite the use of the air hose. *Id.*

On August 24, 1991, Dr. Mitchell, a specialist in internal medicine, examined Decedent concerning dyspnea associated with a cough productive of mucoid phlegm at an asbestos-related product health screening. (CX 39, p.1). Dr. Mitchell related Decedent's limitation as "class two" which was characteristic of dyspnea for those who had difficulty walking fast or climbing a hill. *Id.* Dr. Mitchell noted a two year history of working for Employer and around asbestos related products, and specifically related that Decedent did not smoke cigarettes. *Id.* A pulmonary function evaluation, revealed a FVC capacity of 77% of predicted, with otherwise normal ratios. *Id.* at 2. An x-ray film revealed mild to moderate bilateral thoracic wall pleural thickening. *Id.* at 3. There was also evidence of mild to moderate interstitial pulmonary fibrosis involving the inferior half of each lung. *Id.* Additionally, Decedent had aortic arch calcification and bilateral bronchial wall thickening with small irregular opacities scattered throughout all lung zones. *Id.* All of these findings prompted the radiologist and Dr. Mitchell to diagnose pulmonary asbestosis. *Id.*

On October 18, 1994, Dr. Meshad, an oncologist, opined that Decedent's "asbestos exposure contributed to the development of his lung cancer as a co-carcinogen operating in concert with his tobacco exposure. (CX 36). Dr. Meshad's conclusion was reinforced by a statement made by Dr. Kradin, an associate professor of pathology at Harvard Medical School and director of Pulmonary Immunology and Molecular Biology at Massachusetts General Hospital. (CX 40, p.1). Dr. Kradin, who did not specifically review Decedent's medical records, opined that lung cancer could arise in patients who have been occupationally exposed to asbestos, in the absence of asbestosis. *Id.* at 2. Specifically, Dr. Kradin explained that to definitively rule out the development of lung cancer due to asbestos, without a diagnosis of asbestosis, two requirements had to be met: 1) there must be a formally determined biological mechanism that links asbestosis to the development of lung cancer or 2) there must be incontrovertible epidemiological data to support such a conclusion. *Id.* at 1. Neither factor has been established by medical science. *Id.* Regarding a limited exposure history, Dr. Kradin stated that each individual reacts to asbestos differently. *Id.*

B (3)(b) Evidence Establishing that Claimant Did Not Suffer from an Asbestos-Related Lung Impairment

According to the medical report of Dr. Jones, x-ray evidence taken in 1994 does not support the findings of pulmonary asbestosis from 1991. Specifically, Dr. Jones compared the objective evidence:

Review of chest radiographic studies.

8/24/91 Four views, original films from Pulmonary Advisory Service; fair to good quality; normal heart size, lungs normal except for a questionable, ill-defined nodular density at the right apex, and two short, thick, upper retrosternal line shadows; no pleural abnormality.

5/26/94 Two views, copies from Springhill Memorial Hospital; fair quality (contrasty, scapular overlay); normal heart size; there is now an ill-defined right suprahilar density.

Providence Hospital (all copies)

9/26/94 Two views, good except for scapular overlay and shallow breath; well defined right apical nodule, right suprahilar density, and retrosternal lines.

2/1/95	Two views, good; the right spical density is smaller and ill-defined, and the right suprahilar density has disappeared.
9/26/94	Chest CT; right apical nodule; right suprahilar lymph nodes; blebs, both upper lobes; no diffuse lung disease and no plaques; 81/2 by 131/2 cm heterodense liver mass, partially calcified.
2/1/95	CT, showing regression and dense calcification of liver mass.
4/4/95	CT, showing interval enlargement of liver mass.

(EX 8, p.2)

Reinterpreting this objective data, Dr. Jones concluded that the evidence does “not show lung scarring, i.e., there was no radiographic asbestosis. Nor was there even a pleural plaque.” *Id.* The x-ray evidence finding asbestosis in 1991 simply was not demonstrated in the later x-ray films and CT scans. Dr. Jones concluded that based on Decedent’s short period of exposure, his long smoking history, and the objective evidence, all pointed to the conclusion that Decedent’s lung cancer was not due to asbestosis. *Id.* at 3.

Dr. Cagle, Director of the Department of Pathology at Baylor College of Medicine, issued a report on October 23, 2002, after reviewing three glass slides, a death certificate and medical records from Drs. Meshad and Mitchell as well as radiology reports and records from Providence Hospital and Springhill Memorial Hospital. (EX 6, p. 1). Dr. Cagle opined that Decedent’s tobacco use was sufficient to cause small cell carcinoma even six years after he quit smoking. *Id.* at 2. Dr. Cagle also noted that Decedent’s 1991 x-ray was interpreted as showing interstitial fibrosis, but none of the x-ray or CT scans taken thereafter mention such a finding. *Id.* Decedent had “multiple reasons to have fibrotic changes in his lungs, including sequelae of his lung cancer and its treatment.” *Id.* at 3. Significantly, Decedent “was also a former smoker and tobacco smoke is a cause of interstitial lung disease in some patients.” *Id.* Dr. Cagle admitted, however, that patients who smoke and who are also exposed to asbestos have a greater chance of developing lung cancer. *Id.* Nonetheless, for all practical purposes, those who develop lung cancer due to asbestos exposure also have asbestosis. *Id.*

Dr. Cagle related that he was missing the relevant asbestos exposure data and he could not determine whether Decedent was exposed to more than twenty-five fibers per cc year during his employment, which is the minimum amount necessary to develop asbestos related lung cancer. *Id.* at 3-4.

Dr. Cagle concluded that within a reasonable medical probability, Decedent's small cell carcinoma was caused by tobacco smoking. *Id.* at 4. Additionally, lacking the requisite exposure data, Dr. Cagle had no basis for attributing Decedent's lung cancer to asbestos exposure. *Id.* at 4-5.

B(3)(c) Weighing the Evidence

Drs. Mitchell and Meshad determined that Claimant suffers from an asbestos-related impairment. Dr. Mitchell and his radiologist Dr. Kuebler diagnosed pulmonary asbestosis. (CX 39, p. 3). Dr. Meshad never diagnosed asbestosis, rather he only opined that Decedent's asbestos exposure contributed to the development of his lung cancer as a co-carcinogen operating in concert with tobacco exposure. (CX 36; CX 38). Drs. Cagle and Jones found no evidence of asbestosis and they both opined that Decedent's lung cancer was due to tobacco use. (EX 6, p. 4; EX 8, p. 3).

Dr. Jones was unwilling to find asbestos-related lung cancer in the absence of a diagnosis of asbestosis (EX 8, p. 2), when, as outlined by Dr. Kradin, there is a controversy in the medical community over that issue. (CX 40). Similarly, Dr. Jones never discussed the synergistic effect of tobacco use and asbestos exposure. (EX 8). As Dr. Jones did not fully consider whether Decedent could develop lung cancer without a finding of asbestosis, and did not address the effects of tobacco use combined with asbestos exposure, I entitle his medical report to less weight.

Dr. Cagle stated that he did not have the proper exposure data, and acknowledged that "high levels of asbestos exposure may contribute to 2% of lung cancers."⁵ (EX 6, p. 3). Dr. Cagle further stated that, practically speaking, "patients with lung cancer and the minimal amount of asbestos exposure necessary to increase the risk of lung cancer on digestion study always have asbestosis." *Id.* "The minimal level of exposure required for asbestos related lung cancers is 1000 asbestos bodies per gram of wet weight lung tissue on a digestion study or 25 fibers per cc year in industrial hygiene terms." *Id.* Dr. Cagle acknowledged that asbestos may act as a co-carcinogen with tobacco smoke and stated that those who smoke and are exposed to asbestos have a greater chance of developing lung cancer. *Id.*

I credit the testimony of Sam Buskey, who worked with Decedent on a daily basis, the testimony

⁵ Carroll v. Owens-Illinois Glass Co., 11 Fed. Appx 557 (6th Cir. 2001)(unpub.)(stating that "asbestosis and lung cancer are two distinct diseases, both arising from asbestos exposure"); Ciminio v. Raymark Indus., Inc., 151 F.3d 297, 303 (5th Cir. 1998)(finding that lung cancer can be caused by asbestos, a risk greatly enhanced by smoking); Allen v. Newport News Shipbuilding & Dry Dock Co., 2001 WL 286202 (Dol.Ben.Rev.Bd. March 8, 2001)(crediting a report that asbestosis is not necessary for the development of asbestos related lung-cancer and finding that it is the majority view).

of Claimant, and Decedent's pre-death affidavits, that Decedent was exposed to large quantities of asbestos fibers. (Tr. 47, 72). Employer stipulated that asbestos products were used at its facility while Decedent worked there. (ALJX-1). While, Dr. Mitchell's impression of pulmonary asbestosis is not borne out by subsequent medical evidence, I note that it is some evidence that Claimant met the requisite exposure levels while working for employer.⁶ Also, Decedent's brother, Sam Buskey, who worked for Employer for a longer period has developed asbestosis. (Tr. 72). Although no industrial hygiene study was conducted, I find it more probable than not that Decedent met the minimum exposure levels set by Dr. Cagle to develop asbestos related lung cancer. (EX 6, p. 3).

Thus, with Decedent exposed to the minimum exposure levels necessary to develop asbestos related lung cancer, Dr. Cagle would have a basis for contributing Decedent's lung cancer to asbestos exposure. This clearly was the opinion of Dr. Meshad when he stated that Claimant's asbestos exposure acted as a co-carcinogen with Decedent's tobacco use. (CX 36). Dr. Cagle related that patients who are exposed to asbestos, and who smoke, have an increased risk of developing lung cancer. (EX 6, p. 3). Claimant need not prove that Decedent's asbestos exposure was the sole cause of his lung cancer, only that his asbestos exposure contributed to his lung cancer. Accordingly, I find that Claimant has established by a preponderance of the evidence that Decedent's exposure to asbestos contributed to or aggravated his lung cancer because Decedent was exposed to large amounts of asbestos, Claimant died with lung cancer, and competent medical authorities relate that a diagnosis of asbestosis is not necessary to have asbestos related lung cancer.

C. Section 33(g)

Under Section 33(g) of the Act a claimant "must obtain the prior written approval of a third-party settlement if the gross proceeds of the aggregate settlements are in an amount less than that to which the claimant would be entitled under the Act." *Williams v. Ingalls Shipbuilding Inc.*, 35 BRBS 92, 95 (2001), citing, *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996)(McGranery J., concurring in result only); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 5 (1996)(Brown and McGranery J., concurring in part and dissenting in part). Specifically, Section 33(g) provides:

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person . . . for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the

⁶ I entitle Dr. Mitchell's medical report and diagnosis to less weight because Dr. Mitchell operated under the mistaken assumption that Decedent did not smoke. (CX 39, p.1). While that statement was true in 1991, as Decedent had quit in 1989, a twenty-year smoking history at a pack of day is significant and if Dr. Mitchell had that information his diagnosis may have been different.

employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). . . .

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter. . . .

33 U.S.C. § 933(g) (2001).

In the case of *Ingalls Shipbuilding Inc., v. Director, OWCP, [Yates]*, 519 U.S. 248, 257-58, 117 S. Ct. 796, 136 L. Ed. 2d 736 (1997), the Court determined that a worker's spouse is not a "person entitled to compensation" under Section 33(g) until the injured worker dies. Ms. Yates, the widow of the injured worker, had signed pre-death settlements as part of her husband's asbestos third-party lawsuits.⁷ *Id.* at 252. After her husband's death, Ms. Yates filed a claim under Section 9 for death benefits and did not enter into any more settlements after her husband's death. *Id.* The administrative law judge ruled that Ms. Yates was merely a "potential widow" when she signed the pre-death settlements and that she had no cause of action until the injured employee dies. *Id.* at 252-53. The Board affirmed, reasoning that Ms. Yates' "right to death benefits under the Act could not have vested before she became a widow." *Id.* at 253. The Fifth Circuit affirmed, *id.* at 254, and the Supreme Court also upheld the ruling by the ALJ based on the plain language of Section 33(g). *Id.* at 255-256. Specifically, the Court reasoned that reading Section 33(g) in conjunction with Section 9(b), providing for death benefits, and Section 902(16), defining a "widow" under the Act, indicated that a surviving spouse only qualified for benefits when:

(i) the survivor's deceased worker-spouse dies from a work related injury; (ii) the survivor is married to the worker-spouse at the time of the worker-spouse's death and (iii) the survivor is either living with the worker spouse, dependent on the worker spouse, or living apart from the worker spouse because of desertion or other justifiable cause at the time of the worker-spouse's death.

⁷ Apparently, in *Yates* all settlement amounts were received prior to the worker-spouse's death. Between 1981 and 1984, Mr. Yates, the decedent, "consummated settlement agreements with eight defendants" in his third party litigation. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 461 (5th Cir. 1995).

Yates, 519 U.S. at 257.

Thus, the Court determined that a person seeking death benefits under the Act cannot satisfy the prerequisites for those benefits at an earlier time, i.e., the spouse is not a “person entitled to compensation” at the time the spouse signs a pre-death settlement. *Id.* at 258.

In *Doucet v. Avondale Indus., Inc.*, 34 BRBS 62, 64-65 (2000), the Board upheld the decision of the ALJ when he determined that a settlement was finalized before the decedent’s death, thus, the claimant was not a “person entitled to compensation” even though the funds were received after the death of decedent. Citing Black’s Law Dictionary, the employer had argued that a third-party settlement was not fully executed until the third party paid the agreed-upon settlement amount to the claimant. *Id.* at 64. The employer reasoned that the surviving spouse became a “person entitled to compensation” after her husband’s death, thus, before she could take the settlement funds, that arrived post-mortem, from the release executed pre-death, she had to seek employers approval. *Id.* The Board rejected employer’s argument on two grounds. First, the surviving spouse was not a signatory on the pre-death settlement, thus could not “enter into” the agreement. *Id.* at 65. Second, the Board stated “[t]he point of reference is the date upon which the decedent entered into the settlement” not the claimant received funds by way of her attorneys. *Id.*

In *Wyknenko v. Todd Pacific Shipyards Corp.*, 32 BRBS 16 (1998)(Smith J. dissenting), the Board denied recovery based on Section 33(g) when the claimant entered into unauthorized third party settlements subsequent to her husbands death. Ms. Wyknenko, spouse of the decedent worker, had signed numerous releases prior to her husbands death. *Id.* at 17. Subsequently, Ms. Wyknenko filed a claim for death benefits in 1993 and in 1995 she accepted a settlement, from the earlier third-party litigation, without the employer’s written approval. *Id.* The ALJ determined that the Ms. Wyknenko became a person entitled to compensation on the date of decedent’s death, but since she had entered into a post-death settlement, she was barred from recovery under Section 33(g). *Id.* at 18. No evidence in *Wyknenko* indicates that the settlement Ms. Wyknenko accepted was from a release executed prior to the decedent’s death.⁸

Here, Claimant signed releases in the Decedent’s asbestos litigation and those amounts were deposited in the trust account of Maples & Lomax after his death. The record contains the following

⁸ Indeed, it appears that the settlement Ms. Wyknenko received was from the Manville Personal Injury Settlement Trust. *Wyknenko*, 32 BRBS at 17. In light of the Board’s later holding in *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001), determining that bankruptcy distributions may not be “settlements,” discussed *infra*, it is unlikely that the Board would have reached the same result today.

information regarding the settlements and date of their deposit:

<u>Company</u>	<u>Date of Deposit</u>	<u>Date Release Executed</u>
Amatex	10/6/98	Bnkr. claim filed 04/25/97 by Maples & Lomax
Fiberboard		
Third and Final Deferred	02/17/98	02/25/94
Fiberboard		
Pre 1959 Final Payment	07/23/97	02/25/94
Anchor Packing	3/13/97	03/06/94
Minnesota Mining and Mfg.	7/11/95	06/08/95

(CX 20; 21; 23; 28; 46, p. 137-44; EX 11, p. 11).

Decedent died on June 26, 1995. (CX 7). Thus, all the releases were executed before Decedent's death, with the exception of the proof of claim filed in the Amatex bankruptcy. In accordance with *Yates*, settlements executed before death are undertaken by Decedent, and Claimant has not forfeited her right to death benefits because she was not a party "entitled to compensation" until Decedent died. Following *Doucet*, any release signed by Decedent and later received by Claimant would not act as a bar under Section 33(g). Following *Wyknenko*, any settlement Claimant accepted after the death of the decedent would constitute a settlement to bar compensation under Section 9.

The instant case falls in between the above three cases in that like *Yates*, Claimant was not a person entitled to compensation when she signed the pre-death releases. Unlike *Doucet*, however, Claimant physically signed the releases that were received by Maples & Lomax after Decedent's death. Unlike *Wyknenko*, Claimant never entered into a new settlement after Decedent's death and never personally accepted any settlement amounts after Decedent's death. Rather, on June 26, 1995, Claimant became vested as a "person entitled to compensation" under Section 33(g) and thereafter funds were deposited in to the account of Maples & Lomax. Thus, Claimant's status under the law changed on June 26, 1995.

I find that attributing Claimant's actions as a co-releaser prior to Decedent's death, when Claimant was not a "person entitled to compensation," to Claimant after Decedent's death, when she became vested as a "person entitled to compensation" is inequitable. Rather, like *Doucet*, I find that the time for determining Claimant's status in regard to the releases is at the time those releases were signed. Rights and liabilities of the parties to the settlement agreements should be fixed on the day of execution. Claimant, third

parties, and the Employer should have no greater or lesser rights after Claimant's status changed than they had before in relation to pre-death rights and liabilities. Additionally, I find no reason why Claimant should be punished for a delay by the third parties in releasing the agreed upon settlement amounts. If all the settlement money had been received prior to Decedent's death, then this case would fit squarely in to the facts of *Yates* and Claimant would be entitled to Section 9 benefits. Accordingly, I find that Claimant is not barred under Section 33(g) from receiving death benefits because I find that Claimant's status in regard to those pre-death releases that she co-signed was frozen on the day of execution and her subsequent change of status to a "person entitled to compensation" was of no effect when the actual dollar amounts were deposited in Maples & Lomax's account pursuant to the earlier agreements⁹ Accordingly, none of the releases Claimant co-signed prior to Decedent's death act as a bar under Section 33(g) simply because Claimant became vested as a "person entitled to compensation" after she signed the releases and before the settlement amounts were deposited in Decedent's trust account at Maples & Lomax.

C(1) Amatex Bankruptcy Distribution

A judicial determination of recoverable damages is not akin to a settlement agreement executed and negotiated by opposing parties. *Banks v. Chicago Grain Trimmers' Assn.*, 390 U.S. 459, 467 88 S. Ct. 1140, 20 L. Ed 2d 30 (1968). When damages are determined by the independent evaluation of a trial judge, the purpose behind Section 33(g), to protect employers from having an employee settle for too little with a third party, is not present. *Id.* A Chapter 11 plan under the Bankruptcy Code must be submitted, voted upon and confirmed by the bankruptcy judge. *See* 11 U.S.C. §§ 1121-29 (2001). As such, a Chapter 11 plan confirmed by a bankruptcy judge is more akin to an adjudication than a settlement. *Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92, 97 (2001). As the *Williams* court stated in a similar case dealing with the Amatex Bankruptcy Trust:

The payments made in this case are similar to the judgement and remittitur in *Banks*, as the Trusts sent payments to claimant and other plaintiffs based on reorganization plans which had been deemed fair and approved by the bankruptcy court. Claimant could either accept the amounts offered and consider the cases resolved, or she could decline that amounts and be placed at the end of the lists of the Trusts' "creditors." Negotiation for a greater amount was not an option, as the amount has been determined by the court. The

⁹ Alternatively, I note that Claimant has not "personally" accepted any of the settlement amounts and was unaware that Maples & Lomax's were accepting deposits into Decedent's trust account. (Tr. 56, 61; CX 11, p. 11). Additionally, Claimant has not yet opened an estate for her deceased spouse. (Tr. 49-54).

absence of compromise, the impossibility of individual litigation, and the pre-determined nature of the disbursements support the conclusion that Amatex and Manville offers herein should not be considered settlements, but, rather, should be likened to “judgments.”

Id. at 97 (citations omitted).

Maples & Lomax filed a proof of claim in the bankruptcy of Amatex on April 25, 1997, well after Decedent had passed away. (CX 23). A distribution payment of \$480.00 was sent to Maples & Lomax and deposited in Decedent’s trust account on October 6, 1998. (CX 24, p.1; EX 11, p.11). On December 13, 1999, Maples & Lomax mailed Decedent’s distribution check back to Amatex explaining that the funds were being sent back out of fear that they would jeopardize the pending survivor claims under the Longshore Act. (CX 24, p.2). This check was accepted and deposited by Amatex Claims Trust. (CX 25). Following the rationale of *Banks* and *Williams*, I do not find that filing a proof of claim, post-mortem, and collecting a bankruptcy distribution check constitutes a “settlement” within the meaning of Section 33(g). Practically speaking, neither Claimant, Decedent, nor Maples & Lomax had a chance at blocking the proposed Chapter 11 plan by seeking to have the class representatives vote to block confirmation. The distribution check was clearly not a negotiated settlement between Amatex and Decedent/Claimant. Accordingly, the fact that Maples & Lomax filed a proof of claim on Decedent’s behalf, after his death, and held the bankruptcy distribution check in Decedent’s trust account for over a year, does not have any significance in relation to Section 33(g) because Section 33(g) only applies to settlements and not adjudications.

D. Section 33(f)

Employer contends that it is entitled to a set off under Section 33(f) for any settlement money received by Claimant. Section 33(f) provides:

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. § 933(f) (2001).

The Ninth Circuit in *Taylor v. Director, OWCP*, 201 F.3d 1234 (9th Cir. 2000), decided the issue left open in *Yates*. Namely, whether a pre-death settlement, signed by the surviving spouse, would operate as an offset against the employer's death benefit liability for the amount that the surviving spouse had recovered in pre-death settlements. *Id.* at 1241-42. The Ninth Circuit determined that, absent an absurd or glaringly unjust result, the term "person entitled to compensation" in Section 33(f) should have the same meaning as "person entitled to compensation" in Section 33(g). *Id.* at 1240. The court did not find such an "absurd or glaringly unjust result" by applying the same interpretation to Sections 33(f) & 33(g), even though that would allow a surviving spouse to receive a double recovery in that the spouse was compensated for the injured-worker's impairment while he was alive from the third party, and the spouse would receive compensation a second time, after the injured-worker's death, from the employer. *Id.* at 1241.

Following *Taylor*, I find that Employer is not entitled to a credit for third party settlement funds received by the Claimant as a result of the releases that were signed by Decedent and Claimant. When Claimant executed the releases she was not a "person entitled to compensation" under the Act, thus, Section 33(f) cannot apply to Claimant by its express terms.

D(1) Credit for Money Received Through the Amatex Bankruptcy Trust

For Employer to receive a credit for funds that were sent to Maples & Lomax pursuant to a post-mortem proof of claim filed in a bankruptcy proceeding, Employer must show under the express provision of Section 33(f) that: 1) Claimant was a "person entitled to compensation," and 2) that Claimant instituted and recovered money in a proceeding against a third party. 33 U.S.C. § 933(f) (2001). Section 33(c) defines the meaning of the term "representative" as the "legal representative of the deceased" for Section 33. 33 U.S.C. § 933(c) (2001); *Mallott & Peterson v. Director, OWCP*, 98 F.3d 1170, 1173 (9th Cir. 1996). "While a legal representative of decedent may receive compensation, his attorney cannot." *Stadtmiller v. Mallott & Peterson*, 28 BRBS 304 (1994), *aff'd sub nom.*, *Mallott & Peterson*, 98 F.3d at 1173. *C.f. Terrain Enterprises v. Western Casualty and Surety Co.*, 774 F.2d 1320, 1322 (5th Cir. 1985)(holding that "[i]t is presumed that an attorney who has represented a party is authorized to take all action necessary to conduct the litigation.").

Here, Claimant was clearly a "person entitled to compensation" after the death of Decedent. Claimant, however, never instituted and recovered money in a proceeding against a third party. Under the Board's interpretation of "representative" as a "legal representative" who may receive compensation, and giving the same meaning to the phrase "person entitled to compensation" under Section 33(g) to Section 33(f), as is required by *Taylor, supra*, I find that the firm of Maples & Lomax was not a "person entitled to compensation" under Section 33(f). Thus, Maples & Lomax, acting alone cannot be a "representative" within the meaning of Section 33. After Decedent's death, Claimant has not received any settlement

money, has not signed any releases, and has not authorized anyone to accept money on her behalf. (Tr. 49). Claimant has not opened an estate for Decedent following his death, and on December 19, 1005, she executed a writing instructing Maples & Lomax that she did not want any asbestos settlements because she was pursuing a longshore claim. (Tr. 53-54; CX 26). Accordingly, as Claimant has not authorized and has not instituted any proceeding against a third party, Employer is not entitled to a credit under Section 33(f) for the amount of the Amatex bankruptcy distribution check..¹⁰

E. Conclusion

Claimant established by a preponderance of the evidence that asbestos contributed as a co-carcinogen in the development of Decedent's lung cancer. Specifically, Claimant established that Decedent was exposed to asbestos while working at Employer's facility, that Decedent had lung cancer, and that there is a causal link between asbestos exposure and lung cancer that is exacerbated in patients who smoke. Claimant is not barred for obtaining Section 9 death benefits because all the releases she co-signed were executed prior to Decedent's death and Claimant's status, as a person who was not "entitled to compensation," was fixed, thus, the time when the settlement money was actually deposited is irrelevant. The Amatex bankruptcy distribution check was not a settlement under Section 33(g) because a distribution check in a large Chapter 11 proceeding is more akin to an adjudication rather than a negotiated settlement. Employer is not entitled to a set off under Section 33(f) because the same meaning given to a "person entitled to compensation" under Section 33(g) is transferred to Section 33(f). Accordingly, as Claimant was not a "person entitled to compensation" at the time she executed the releases, she was not a "person entitled to compensation" when the settlement checks were deposited in Decedent's trust account by Maples & Lomax. Employer is not entitled to a set-off for the amount deposited in Decedent's trust account from the Amatex bankruptcy because, under Board precedent, Maples & Lomax is not the "legal representative" of Decedent in that they are not entitled to receive compensation. Additionally, Claimant never approved the acceptance of the distribution check either expressly or impliedly.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount

¹⁰ Accordingly, there is no need to determine whether Maples & Lomax's holding the funds in Decedent's trust account for over a year constituted an act of acceptance. Should Claimant decide to open an estate for her deceased husband and accept the Amatex distribution check, Employer may be entitled to a Section 33(f) credit against compensation owed.

of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find that Decedent's death was caused, in part, to his exposure to asbestos at Employer's facility, and that Employer is not entitled to a Section 33(g) defense or sett-off pursuant to Section 33(f). Accordingly, Claimant has proved her entitlement to Section 9 benefits.

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CLEMENT J. KENNINGTON

Administrative Law Judge